APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 81-5182

United States of America,

Appellee,

versus

Paul L. Manning,

Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Richard C. Erwin, District Judge.

Argued April 2, 1982 Dated May 7, 1982

Before HAYSNSWORTH, Senior Circuit Judge, WIDENER and CHAPMAN, Circuit Judges.

Donald MacPherson (Frederick Lutz on brief) for Appellant; James P. Springer, Tax Divsion, Dept. of Justice (Glenn L. Archer, Jr., Assistant Attorney General; Kenneth W. McAllister, United States Attorney on brief) for Appellee.

PER CURIAM:

Manning was convicted of willfully failing to file an income tax return for the years 1976, 1977 and 1978 in violation of 26 U.S.C. § 7203. Because we find no merit to the arguments that Manning raises on appeal, we affirm the judgment of the district court.

At trial, Manning testified that in October of 1976 he changed accountants. Manning's new accountant allegedly told him that his former accountant had made mistakes on Manning's previous returns and that he might have to pay additional taxes and penalties. In light of this information, according to Manning, he filed a 1976 return which only disclosed his name, address, social security number, number of dependents, federal income tax withheld, estimated tax payments and exemptions. In all of the other blanks

Manning either entered a zero or an asterisk. The asterisk indicated that he was objecting to the question on the basis of the First, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Thirteenth, Fourteenth and Sixteenth Amendments. Manning also attached over one hundred pages of protest literature to the form.

In 1978 Manning filed a document which purported to amend his 1976 return. This form contained the same information previously provided, but in the spaces provided for income, he wrote "Object: Self-Incrimination."

The forms submitted by Manning for 1977 and 1978 contained only his name, address, social security number and number of dependents. In all of the other blanks Manning wrote "Object: Self-Incrimination" or "none." When Manning submitted these forms he was under the

threat of criminal prosecution because of his 1976 return.

Manning's first claim on appeal is that he made a valid exercise of the Fifth Amendment on his 1976, 1977 and 1978 returns. As to the 1976 return, he argues that he properly exercised his Fifth Amendment right because he feared that the Internal Revenue Service could use information from that return to discover the alleged errors made in the previous returns. At this time, however, Manning faced no real threat of criminal prosecution. His proper course of action would have been to file an amended return showing the errors on his previous returns and to pay the back taxes that were owed.

As to the 1977 and 1978 returns, Manning argues that he claimed the Fifth Amendment because he was under investigation for his 1976 return. Manning claims

that if he had filled out these returns this would have provided the government with evidence in its criminal prosecution because it would have shown that Manning knew how to fill out a return. Manning's ability to fill out returns was never a real issue, however, because he had filed returns for his corporation and for himself in the years prior to 1976. Therefore, we find that Manning's conduct was not protected by the Fifth Amendment in 1976, 1977 or 1978.

Manning also claims that the district court erred by failing to instruct the jury that a good faith exercise of his Fifth Amendment right was a defense. The trial court did give a good faith instruction when it instructed the jury on willfulness, however. Under this instruction, the jury could not have convicted Manning if it believed that

Manning was honestly mistaken in his belief that he was not required to give the government any more information. We therefore find that the district court properly instructed the jury. The district court was not required to give the specific instruction that Manning requested.

We have considered the other arguments that Manning raises on appeal, and we find no merit in them.

In light of the foregoing, the district court's judgment is affirmed.

AFFIRMED

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 81-5182

United States of America,)
Appellee,)
) ORDER
vs.)
)
Paul L. Manning,)
Appellant.)

Upon consideration of the petition for rehearing and the motion for stay of the mandate pending the filing of a petition for writ of certiorari, no one having requested a poll of the court on the suggestion of rehearing en banc,

IT IS NOW ORDERED that the petition for rehearing and the motion for a stay be, and each hereby is, denied.

With the concurrence of Judge Widener and Judge Chapman.

/s/ Judge Haynsworth
United States Senior
Circuit Judge

June 8, 1982

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Mr. Michael L. Paup
Chief, Appellate Section
Tax Division
United States Department
of Justice
Washington, D.C. 20530

this 6th day of August, 1982.

Donald W. MacPherson, Esq.
10220 North 31st Avenue
Suite 129
Phoenix, Arizona 85021
(602) 944-3328
Attorney for Petitioner
PAUL L. MANNING